BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Federal-State Joint Board	)	CC Docket No. 96-45
on Universal Service	)	
	)	

REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA"),[1] by its attorneys, submits its Reply Comments in the above-captioned proceeding.[2]

INTRODUCTION AND SUMMARY

In its initial Comments to the Joint Board's Recommended Decision,[3] CTIA urged the Commission to adopt, consistent with Congressional intent, rules incorporating the following

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

2 Federal-State Joint Board on Universal Service, Public Notice, "Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision," in CC Docket No. 96-45, DA 96-1891 (released November 18, 1996).

3 Federal-State Joint Board on Universal Service, Recommended Decision in CC Docket No. 96-45, FCC 96J-3 (released November 8, 1996) ("Recommended Decision").

principles: (1) that any universal service eligibility rules account for and include wireless technologies; (2) that the final proxy model account for wireless technologies; (3) that all telecommunications carriers be eligible to receive universal service support for service to schools and libraries; (4) that the overall size of the universal service support be restrained as a means of minimizing resulting market effects; and (5) that the Commission, contrary to the Joint Board's recommendation, largely preempt State regulation of CMRS providers for universal service concerns, as provided in Section 332.[4] Only by such action will the Commission fulfill its statutory universal service implementation obligations.

On reply, CTIA addresses two issues which bear emphasis:

- The Commission should ensure that the jurisdictional statements found in Section 332 are fully preserved; that is, Congress has clearly expressed its intention that States cannot regulate CMRS providers for universal service concerns except in the most limited of circumstances; and

- The Commission should reject commenter requests to expand the list of core universal services required of eligible telecommunications carriers. Such efforts represent attempts to exclude outright wireless participation, contrary to Congress' intentions.

I. THE COMMISSION'S FINAL RULES MUST REFLECT CONGRESS' EXPRESS PREEMPTION OF STATE REGULATION OF CMRS PROVIDERS FOR UNIVERSAL SERVICE.

Contrary to the express terms of the Communications Act,[5] the Joint Board declared, without discussion or analysis, that

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[4] 47 U.S.C. § 332(c)(3)(A).

[5] Any interpretation by the Commission which would have the effect of repealing the terms of Section 332 would violate

"section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms."[6] CTIA does not object to the notion that CMRS carriers, as telecommunications providers, are obligated under Section 254 to contribute to the Commission's universal service program. But it respectfully disagrees with the Joint Board's finding with respect to Section 332, and continues to believe that any requirement to contribute to State administered programs violates the plain meaning of the Communications Act.[7]

In the 1993 amendments to Section 332[8] Congress established the limited framework under which States are permitted to require CMRS carriers to contribute to their universal service programs. Specifically, Congress proscribed the States' authority to regulate for universal service concerns in the following manner:

Section 601(c) of the Telecommunications Act of 1996 ("1996 Act"), requiring that the 1996 Act not be interpreted to repeal any Federal law unless expressly stated. In addition, there is a presumption of statutory interpretation against the repeal of a law by implication. See 1A Norman J. Singer, Sutherland Statutes and Statutory Construction § 22.30 (5th ed. 1993); United States v. Welden, 377 U.S. 95, 103 n.12 (1964); Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988) ("This is a basic premise of our representative democracy; legislatures, not courts [or agencies], amend and repeal statutes.").

6 Recommended Decision at ¶ 791.

7 See also AirTouch comments at 30-33; Bell Atlantic Nynex Mobile comments at 5-9 ("BANM"); Personal Communications Industry Association comments at 32 (further demonstrating that Section 332 preempts States from compelling CMRS carriers to contribute to intrastate universal service mechanisms).

8 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993).

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[9]

Underlying Congress' passage of this provision was the understanding that preemption of State regulation of CMRS for universal service, except under the most limited of circumstances, would "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[10] That is, Congress specifically and drastically limited that States' ability to regulate CMRS rates, even for such a fundamental concern as universal service.

Recent case law fully supports (and arguably requires) a plain meaning construction of Section 332.[11] In Metro Mobile, a Connecticut Superior Court concluded that the Connecticut Department of Utility Control could not require cellular carriers to make payments towards the State's universal service and

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9 47 U.S.C. § 332(c)(3)(A) (emphasis added).

10 H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993); see also BANM comments at 6-7; CTIA comments at 13-15 (providing a detailed analysis of the legislative history of Section 332).

11 Metro Mobile v. Connecticut Department of Public Utility Control, No. CV-95-0051275S, 1996 Conn. Super. LEXIS 3326 (Conn. Super. Ct. Dec. 9, 1996).

lifeline decision programs.[12] Recognizing that neither a court nor an agency should ignore the unambiguous language of a statute, the court found:

> [b]y expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption.[13]

The Commission should reject the Joint Board's recommendation, and, in accord with the court's determination that Congress has spoken unequivocally on the matter, conclude that CMRS carriers are subject to State universal service requirements only in narrow circumstances.

This result is entirely consistent with the 1996 amendments to the Communications Act. In the Telecommunications Act of 1996 ("1996 Act"), Congress not only preserved the integrity of Section 332, but also mandated that State universal service programs, as they affect CMRS providers, explicitly comply with Section 332. Two provisions of the 1996 Act generally illuminate a State's ability to implement universal service requirements: namely, Sections 253 and 254. Section 253(b)[14] reiterates a State's general authority to implement universal service obligations in a competitively neutral basis. Importantly,

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12 The court also rejected the contention that these programs fell within the purview of the "terms and conditions" exception to Section 332. Id. at *8.

13 Id. (emphasis added).

14 47 U.S.C. § 253(b).

though, Section 253(e) plainly states that, "nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[15] Because the language limiting the State's ability to regulate for universal service is contained in Section 332(c)(3), Section 253(e) effectively operates as a savings clause for Section 332. This means that State programs continue to be sharply circumscribed in their application to CMRS carriers.

Moreover, Section 254(f) specifically prohibits States from adopting regulations which would be inconsistent with the Commission's rules. As demonstrated in the BANM comments, "[s]ection 332(c)(3) merely imposes another limitation on state authority to adopt universal service rules [under Section 254]--not only must such rules be consistent with federal rules, they may not be generally applicable to CMRS providers."[16]

Principles of statutory construction support the conclusion that Section 332 circumscribes the States' ability to impose universal service obligations on CMRS providers. The Supreme Court has consistently held that where Congress has spoken explicitly and precisely about a specific matter, the explicit language necessarily takes precedence over a later enacted more general provision.[17] In this instance, Congress spoke explicitly

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15 47 U.S.C. § 253(e).

16 BANM comments at 8; see also CTIA comments at 15-16.

17 See Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987); Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a

in the 1993 amendments to Section 332 about the circumstances under which States may impose universal service obligations upon CMRS carriers.[18] The general language of Section 254, although later enacted, cannot be permitted to submerge the more narrow and precise directive of Section 332,[19] especially when considered in conjunction with the Section 253(e) savings clause.

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specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (citation omitted)).

[18] Similarly, the Court has also held that "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rusello v. U.S., 464 U.S. 16, 23 (1983) (quoting U.S. v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972); see Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("The contrast between the language used in the two standards, and the fact that Congress used a new standard. . . certainly indicate that Congress intended the two standards to differ."). Consistent with the Court's holdings, the Commission must conclude that Congress acted intentionally, and therefore was not obligated to restate the provisions of the 1993 amendments. In other words, Congress must be presumed to have acted with full knowledge of the 1993 amendments, and by its further legislation in the 1996 Act, supported the continued applicability of Section 332.

[19] Radzanower at 153 ("The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." (citation omitted)).

II. THE JOINT BOARD'S RECOMMENDATIONS ESTABLISHING CARRIER ELIGIBILITY SHOULD BE ADOPTED BY THE COMMISSION.

Congress carefully considered and clearly enunciated the principles under which carriers are required to operate to qualify for universal service supports.[20] The Recommended Decision expounds upon Congress' intent by establishing a framework under which eligible carriers will provide their services. In addition to specifying the services which eligible carriers must provide, the Recommended Decision sought to include the added principle of competitive neutrality.[21] The Commission should adopt these recommendations, and deny any requests for modification which would deviate from the principles set forth in the Act.

Several commenters have asked the Commission to impose additional burdens on wireless carriers which were never contemplated by Congress.[22] TCA, for example, goes even further by arguing that "[s]upport must only be given to facilities-based, wireline carriers."[23] The Joint Board, however,

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20 See 47 U.S.C. § 214(e); 47 U.S.C. § 254(c).

21 Recommended Decision at ¶ 23 ("Universal service support mechanisms and rules should be applied in a competitively neutral manner.").

22 See, e.g., NYNEX comments at 5-6 (a wireless carrier should be permitted to "receive universal service support only if 1) it was providing the only service to a customer, or 2) the customer designated the wireless carrier as the primary carrier and the customer was required to pay a non-subsidized rate for any wireline service to the same residence." Such requests, to the extent that they exceed the language found in the Communications Act, would violate the principle of competitive neutrality.

23 TCA comments at 5.

recognized that Congress sought to support core services or their functional equivalent through competition, and that additional requirements, which would exclude certain carriers, would violate principles of competitive neutrality. The Commission's final rules should be consistent with notions of competitive neutrality and must be flexible to account for all forms of carriage.

The Joint Board concluded that eligible carriers would be required to provide access to emergency services[24] as well as access to interexchange carriers.[25] In a veiled attempt to exclude wireless providers from becoming eligible carriers, several rural interests have asked the Commission to expand these requirements to include access to E911 services and equal access to interexchange carries.[26] Such requests should be rejected.

In accordance with the Commission's requirement that wireless carriers achieve E911 capabilities within five years, wireless carriers are currently proceeding to implement the necessary technical upgrades. Requiring eligible carriers to provide E911 services would not only exclude wireless carriers in the near term, but would unfairly negate the Commission's five year timetable.[27]

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24 Recommended Decision at ¶ 51.

25 Recommended Decision at ¶ 65.

26 TCA comments at 2-3; GVNW Inc. comments at 4-5

27 Recommended Decision at ¶ 51 (As noted by the Joint Board, "requiring carriers to provide E911 would presently exclude all wireless carriers from eligibility . . . contrary to the principle that universal service be competitively neutral. Accordingly, we recommend not including E911 service within the definition of services to be supported.").

Equal access to interexchange services was also thoroughly considered and properly rejected in the Recommended Decision. The Joint Board reasoned, "that equal access should not be supported because of the potential costs to wireless carriers involved in upgrading facilities and because wireless carriers are not currently required [by Congress] to provide equal access."[28] Like E911, the Commission should not require wireless carriers to provide services, beyond the core services, which they are not currently able or required by Congress to provide.[29]

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[28] Recommended Decision at ¶ 66 (citing 47 U.S.C. § 332(c)(8) ("a person engaged in the provision of commercial mobile services . . . shall not be required to provide equal access to common carriers for the provision of telephone toll services")).

[29] GVNW argues that service to the public will be "downgrade[d]" if these requirements are not imposed. GVNW comments at 4. GVNW apparently fails to recognize that the Joint Board's recommendations do not foreclose the possibility that these services will be offered. It merely establishes the critical services, which at a minimum, all carriers must provide.

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt universal service provisions which fully implement the plain meaning of Congress in enacting Sections 332 and Sections 214(e), 253 and 254 of the 1996 Act.

Respectfully submitted,

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